Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-4

SUN FINANCE AND LOAN COMPANY,
Petitioner,

vs.

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
OHIO STATUTES INVOLVED	2
STATEMENT OF THE CASE	7
ARGUMENT	10
CONCLUSION	13

AUTHORITIES CITED

Cases:	Page
Aero Mayflower Transit Co. v. Board of R. R. Commissioners, 332 U.S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947)	12
Armour & Co. v. Kosydar, 46 Ohio St. 2d 450, 349 N.E. 2d 301 (1976)	12
Butler Bros. v. McColgan, 315 U.S. 501, 62 S. Ct. 701, 86 L. Ed. 991 (1942)	12
Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)	13
Groppi v. Wisconsin, 400 U.S. 505, 91 S. Ct. 490, 27 L. Ed. 2d 571 (1971)	13
International Harvester Co. v. Evatt, 329 U.S. 416, 67 S. Ct. 444, 91 L. Ed. 390 (1947)	12
Lynch v. New York, 293 U.S. 52, 55 S. Ct. 16, 79 L. Ed. 191 (1934)	10

	Page
Midland Guardian Company v. Kosydar, Tax Commissioner, BTA Case No. 71-01-0224	7
National Asso. for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 403 (1963)	12-13
Petrocon v. Kosydar, 38 Ohio St. 2d 264, 313 N.E. 2d 373 (1974)	12
S. S. Kresge Co. v. Bowers, 170 Ohio St. 405, 166 N.E. 2d 139 (1960)	8
Underwood Typewriter Company v. Chamberlain, 254 U.S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920)	12
Wheeling Steel Corp. v. Fox, 298 U.S. 193, 56 S. Ct. 773, 80 L. Ed. 1143 (1936)	12
Wolfe v. North Carolina, 364 U.S. 177, 80 S. Ct. 1482, 4 L. Ed. 2d 1650 (1960)	12

Other Authorities:

Constitutional Provisions

U.S. Const., Art. I, § 8, cl. 3	2
U.S. Const., Amend. XIV, § 1	2

Ohio Statutes

Ohio Rev. Code § 5717.04	9
Ohio Rev. Code § 5725.01 (B)	2-3, 7
Ohio Rev. Code § 5725.13	3-4
Ohio Rev. Code § 5725.14	4-5, 7
Ohio Rev. Code § 5725.15	5-6, 7, 8, 9, 12, 13
Ohio Rev. Code § 5725.26	6, 12

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OPINIONS BELOW

The opinion delivered by the Supreme Court of Ohio is officially reported in 45 Ohio St. 2d 283, 344 N.E. 2d 330 (1976), and is appended to the Petition for Writ of Certiorari. The unreported denial of Petitioner's Motion for Rehearing is also appended to the Petition for Writ of Certiorari.

The Ohio Board of Tax Appeals issued a written decision by journal entry that is appended to the Petition for Writ of Certiorari.

JURISDICTION

Respondent questions the jurisdiction of this Court since the Supreme Court of Ohio did not decide any federal question.

QUESTION PRESENTED

Does this Court have jurisdiction to review the decision of the Supreme Court of Ohio when the record indicates that no federal question was decided by that court, that it was not necessary to consider a federal question in order to arrive at the decision rendered, and the failure to decide the federal question was not done with the intent to deprive this Court of jurisdiction over such federal question?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3:

> "The Congress shall have power . . .
>
> ". . .
>
> "To regulate commerce with foreign nations and among the several States, and with the Indian tribes;"

U.S. Const., Amend. XIV, § 1:

> " . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . "

OHIO STATUTES INVOLVED

Ohio Rev. Code § 5725.01 (B):

> (B) "Dealer in intangibles" includes every person who keeps an office or other place of business in this state and engages at such office or other place in the business of lending money, or discounting, buying,

> or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness, or of buying or selling bonds, stocks, or other investment securities, whether on his own account with a view to profit, or as agent or broker for others, with a view to profit or personal earnings. Dealer in intangibles excludes institutions used exclusively for charitable purposes, insurance companies, and financial institutions. Neither casual nor isolated transactions of any of the kinds enumerated in this division of this section nor the investment of funds as personal accumulations or as business reserves or working capital constitute engaging in business within the meaning of this division of this section; but a person who, having engaged in the business of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtededness on his own account, remains in business for the purpose of realizing upon the assets of such business is deemed a dealer in intangibles, though not presently engaged in lending money or discounting or buying such securities.

Ohio Rev. Code § 5725.13:

> The following property shall be listed and assessed at its fair value and taxed only in the manner prescribed in sections 5725.01 to 5725.26, inclusive, of the Revised Code:
>
> (A) The shares of the stockholders in an incorporated dealer in intangibles having an actual place of business in this state, to the extent represented by capital employed in this state;
>
> (B) The shares of the stockholders, partners, or members of an unincorporated dealer in intangibles having an actual place of business in this state, the capital stock of which is divided into shares held by the owners, to the extent represented by capital employed in this state;

(C) The property representing capital employed in this state by an unincorporated dealer in intangibles whose capital stock is not divided into shares, having an actual place of business in this state.

Ohio Rev. Code § 5725.14:

Each dealer in intangibles shall return to the tax commissioner between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, his resources and liabilities at the close of business on the thirty-first day of December next preceding. In the case of an unincorporated dealer in intangibles, such report shall also exhibit the amount or value as of the date of conversion of all property within the year preceding the date of listing, and on or after the first day of November converted into bonds or other securities not taxed to the extent such nontaxable bonds or securities may be shown in his resources on such date, without deduction for indebtedness created in the purchase of such nontaxable bonds or securities.

If a dealer in intangibles maintains separate business offices, whether within this state only or within and without this state, said report shall also show the gross receipts from business done at each such office during the year ending on the thirty-first day of December next preceding.

"Gross receipts" as used in this section and section 5725.15 of the Revised Code, means, in the case of a dealer in intangibles principally engaged in the business of lending money or discounting loans, the aggregate amount of loans effected or discounted; in the case of a dealer in intangibles principally engaged in the business of selling or buying stocks, bonds, and other similar securities either on his own account or as agent for another, gross receipts means the aggregate amount of all commissions charged plus one per cent of the aggregate amount of all other receipts.

As used in this section and section 5725.15 of the Revised Code business is considered done at an office when it originates at such office, but the receipts from business originating at one office and consumated at another office shall be divided equitably between such offices.

An incorporated dealer in intangibles which owns or controls fifty-one per cent or more of the common stock of another incorporated dealer in intangibles may, under uniform regulations prescribed by the tax commissioner, make a consolidated return for the purpose of sections 5725.01 to 5725.26, inclusive, of the Revised Code. In such case the parent corporation making such return is not required to include in its resources ony of the stocks, securities, or other obligations of its subsidiary dealers, nor permitted to include in its liabilities any of its own securities or other obligations belonging to its subsidiaries.

Ohio Rev. Code § 5725.15:

Upon receiving the report required by section 5725.14 of the Revised Code, the tax commissioner shall ascertain and assess all the shares of such dealers in intangibles, the capital stock of which is divided into shares, representing capital employed in this state, and the value of the property representing the capital, not divided into shares, employed in this state by such dealer in intangibles, according to the aggregate fair value of the capital, surplus, and undivided profits as shown in such report, including in the case of an unincorporated dealer, the value of property converted into nontaxable bonds or securities within the preceding year, without deduction for indebtedness created in the purchase of such nontaxable bonds or securities.

If a dealer has separate officers, whether within this state only or within and without this state, the commissioner shall find the amount of capital employed in each office in this state, which shall bear the same ratio

to the entire capital of such dealer, wherever employed, as the gross receipts of such office bears to the entire gross receipts of such dealer, wherever arising.

The aggregate book value of the capital, surplus, and undivided profits of a dealer in intangibles as shown in such report shall be taken as the fair value thereof for the purpose of the assessment required by this section, unless the commissioner finds that such book value is greater or less than the then fair value of said capital, surplus, and undivided profits. Claim for any deduction from book value of capital, surplus, and undivided profits must be made in writing by the dealer in intangibles at the time of making his return.

Whenever the commissioner assesses the fair value of the capital, surplus, and undivided profits of a dealer in intangibles at an amount in excess of the book value thereof as shown by its report, or disallows any claim for deduction from book value of such capital, surplus, and undivided profits, he shall give notice and proceed as provided in section 5711.31 of the Revised Code.

Ohio Rev. Code § 5725.26:

> The real estate of a financial institution or dealer in intangibles shall be taxed in the place where it is located, the same as the real estate of persons is taxed, but the taxes provided for in sections 5725.01 to 5725.26, inclusive, of the Revised Code, shall be in lieu of all other taxes on the other property and assets of such institution or dealer, except personal property taxable under Chapter 5711. of the Revised Code and leased, or held for the purpose of leasing, to others if the owner or lessor of the property acquired it for the sole purpose of leasing it to others.

STATEMENT OF THE CASE

Petitioner, Sun Finance & Loan Company (hereinafter referred to as Sun), is an Ohio corporation primarily engaged in the sales and consumer finance business in Ohio. Sun is the parent of numerous wholly owned but separately incorporated and operated consumer finance businesses located within and without the State of Ohio.

During the tax years 1968, 1969, 1970 and 1971, Sun filed consolidated dealer-in-intangibles tax returns pursuant to Ohio Rev. Code § 5725.14. Included in each of the annual returns was a statement of the net worth of Sun (the parent corporation) as well as each of those subsidiary corporations, which qualified as statutory "dealers in intangibles."[1] Those subsidiary corporations which were not qualified to do business in Ohio and which did not maintain an office or place of business in Ohio were accordingly excluded from the consolidated return.

The Tax Commissioner of Ohio ascertained the "amount of capital employed in each office in this state" pursuant to Ohio Rev. Code § 5725.15 by dividing the Ohio gross receipts of the consolidated "dealers in intangibles" by the total gross receipts of such "dealers in intangibles," wherever arising. The net worth (tax base) was multiplied by this apportioned percentage to arrive at the taxable net worth to Ohio upon which the dealer-in-intangibles tax was ultimately computed.

On March 28, 1972, the Ohio Board of Tax Appeals decided the case of *Midland Guardian Company* v. *Kosydar, Tax Commissioner,* BTA Case No. 71-01-0224, wherein the Board of Tax Appeals construed Ohio Rev. Code § 5725.15

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[1] Ohio Rev. Code § 5725.01 (B).

to mean that only the parent corporation is required to be a statutory "dealer in intangibles" for purposes of apportioning the gross receipts to Ohio. The effect of this decision was to allow a dealer in intangibles that filed a consolidated return to include the total gross receipts of its subsidiary corporations, wherever arising, in the denominator of the apportionment formula regardless of whether the subsidiary corporations were statutory "dealers in intangibles." The Tax Commissioner of Ohio did not appeal that decision.

Subsequent to the *Midland Guardian* decision, Sun filed applications for refunds for the tax years in issue wherein it contended that since it was required to include the net worth of all of its wholly owned, separately incorporated, out-of-state (non-"dealer") subsidiaries in the tax base, the business done by these same out-of-state subsidiaries must be used in determining the extent to which the total net worth should be apportioned to Ohio. The Tax Commissioner, in written certificates of determination, refused to follow the construction given to Ohio Rev. Code § 5725.15 by the Board of Tax Appeals in the *Midland Guardian* case and denied the claimed refunds.

Sun appealed the Tax Commissioner's decisions to the Board of Tax Appeals whereupon the Board reversed the Tax Commissioner's decisions and ordered the refunds based on its prior decision in the *Midland Guardian* case.[2]

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[2] In its notices of appeal to the Board of Tax Appeals, Sun contended that the Tax Commissioner's application of OHIO REV. CODE § 5725.15 violated the commerce clause and the due process clause of the United States Constitution. As a result of its decision, those errors were moot in that forum. However, the Board of Tax Appeals could not have decided the constitutional issues in any event. *S. S. Kresge Co.* v. *Bowers*, 170 Ohio St. 405, 166 N.E. 2d 139 (1960).

The Tax Commissioner appealed the decision of the Board of Tax Appeals to the Supreme Court of Ohio pursuant to Ohio Rev. Code § 5717.04. Sun did not cross-appeal the decision of the Board of Tax Appeals.

In its opinion, the Supreme Court of Ohio stated that:

> "The sole issue before this court is whether the business done by Sun's out-of-state consumer finance subsidiaries, which subsidiaries do not operate offices in Ohio, should be included in the R. C. 5725.15 apportionment formula utilized to determine the extent to which Sun's total net worth is to be allocated to Ohio."
>
> 45 Ohio St. 2d at 284,
> 344 N.E. 2d at 331-332.

The court construed Ohio Rev. Code § 5725.15 to mean that the denominator of the apportionment formula could contain the gross receipts of only those subsidiary corporations which qualify as statutory "dealers in intangibles." The Supreme Court of Ohio noted that:

> "This result is mandated by statute, even though all such loans must be included in the assets of Sun in making the fair value computation required by R. C. 5725.13. Sun is the parent corporation, and, as such, its capital account includes the value of its wholly-owned, separately incorporated, out-of-state divisions. This capital is available for use in this state and thus is 'capital employed' in this state in accordance with R. C. 5725.13."
>
> 45 Ohio St. 2d at 288,
> 344 N.E. 2d at 334.

As a result of the arguments made by Sun in its brief that the Tax Commissioner's application of Ohio Rev. Code § 5725.15 violated the commerce clause and due

process clause of the United States Constitution, the Supreme Court of Ohio stated that:

> "Sun also claims that '[a]cceptance of the interpretation urged by the commissioner would result in an unconstitutional method of taxation.' Because the record is insufficient to warrant consideration of this assertion, *we do not reach this issue*. See *Petrocon* v. *Kosydar* (1974), 38 Ohio St. 2d 264."
>
> 45 Ohio St. 2d at 284,
> 344 N.E. 2d at 332, fn. 1.
> [emphasis added]

Sun petitioned the Supreme Court of Ohio to rehear its constitutional argument, but that request was subsequently denied without opinion.

ARGUMENT

Sun is attempting to invoke the jurisdiction of this Court to review a decision of the Supreme Court of Ohio wherein that court specifically declined to decide the federal question that Sun attempts to put before this Court because the record was "insufficient to warrant consideration" of the constitutional issues.

In *Lynch* v. *New York*, 293 U.S. 52, 55 S. Ct. 16, 79 L. Ed. 191 (1934), this Court was asked to review a decision of the New York supreme court that reversed a decision of the State Tax Commission. In its decision, the New York supreme court "failed to state that its decision rested upon the application of the Constitution of the United States."[3]

[3] That decision was affirmed without opinion by the New York court of appeals. 293 U.S. at 54, 55 S. Ct. at 17, 79 L. Ed. at 192.

In dismissing the writ of certiorari as "improvidently granted" this Court stated that:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was represented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U.S. 216, 234, 32 L. ed. 125, 132, 8 S. Ct. 1053; Johnson v. Risk, 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 295, 297, 35 L. ed. 193-197, 11 S. Ct. 528; Eustis v. Bolles, 150 U. S. 361, 366, 367, 37 L. ed. 1111, 1112, 14 S. Ct. 131; Whitney v. California, 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1098, 1099, 47 S. Ct. 641; Mellon v. O'Neil, 275 U.S. 212, 214, 72 L. ed. 245, 246, 48 S. Ct. 62. . . ."
>
> 293 U. S at 54, 55 S. Ct. at 17,
> 79 L. Ed. at 193.

In the instant case, the Supreme Court of Ohio specifically declined to decide the federal question raised by Sun in its brief because of the "insufficient" record before the court. Moreover, a decision on the federal question was not necessary in order for the Supreme Court of Ohio to reach its decision. The Tax Commissioner of Ohio was the appellant before that court and he placed before that court a single issue, the proper construction that was to be afforded a statute enacted by the Ohio General Assembly. As such, there are essential elements lacking in this case which prevent this Court from granting the writ of certiorari.

This is not a case where a state court attempted to defeat

the jurisdiction of this Court by refusing to decide a federal question. *Wolff* v. *North Carolina,* 364 U.S. 177, 80 S. Ct. 1482, 4 L. Ed. 2d 1650 (1960). The Supreme Court of Ohio has consistently declined to render a decision on a federal question in tax cases when there is no adequate factual basis to do so. *Petrocon* v. *Kosydar,* 38 Ohio St. 2d 264, 313 N.E. 2d 373 (1974); *Armour & Co.* v. *Kosydar,* 46 Ohio St. 2d 450, 349 N.E. 2d 301 (1976). Such a position is consistent with the decisions of this Court which hold that a taxpayer who claims that a state taxing statute is unconstitutional has the burden of proof to show the conflict between the United States Constitution and the state statute. Cf. *Underwood Typewriter Company* v. *Chamberlain,* 254 U.S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920); *Butler Bros.* v. *McColgan,* 315 U.S. 501, 62 S. Ct. 701, 86 L. Ed. 991 (1942); *International Harvester Co.* v. *Evatt,* 329 U.S. 416, 67 S. Ct. 444, 91 L. Ed. 390 (1947).[4]

Petitioner has argued that this Court should grant a writ of certiorari because the decision of the Supreme Court of Ohio is inconsistent with other state court decisions construing similar statutes relative to the consumer finance industry. This is clearly not a basis for this Court to take jurisdiction of the case. This Court is bound by the construction given to Ohio Rev. Code § 5725.15 by the Supreme Court of Ohio. *Aero Mayflower Transit Co.* v. *Board of R. R. Commissioners,* 332 U.S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947); *National Asso. for Advancement*

[4] The dealer-in-intangibles tax levied in OHIO REV. CODE chap. 5725 is in lieu of all property taxes, except real property taxes. OHIO REV. CODE § 5725.26. Additionally, because Sun (the parent) is domiciled in Ohio, its ownership in its subsidiary corporations (intangibles) is properly situsted to Ohio for property taxation by the method prescribed in OHIO REV. CODE Chap. 5725. *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143 (1936).

of Colored People v. *Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 403 (1963); *Groppi* v. *Wisconsin,* 400 U.S. 505, 91 S. Ct. 490, 27 L. Ed. 2d 571 (1971); *Eisenstadt* v. *Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). As such, it cannot accept jurisdiction of the case for the purpose of giving Ohio Rev. Code § 5725.15 a different construction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

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